

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
825 North Capitol Street, NE, Suite 4150
Washington, DC 20002-4210

MARGERY ARROWOOD
Petitioner,

v.

SUNRISE SENIOR LIVING.
Respondent

Case No.: DH-C-06-800048

FINAL ORDER

I. Introduction

Pursuant to D.C. Official Code § 44-1003.03 Petitioner, Margery Arrowood, filed a request for a hearing on February 3, 2006, challenging her discharge by Respondent, Sunrise Senior Living, from its nursing home facility located at 1330 Massachusetts Avenue, N.W. (the “Facility”). The hearing request alleges that the discharge was involuntary and that it took place on January 26, 2006.

Also on February 3, 2006, I issued a Case Management Order requiring the parties to appear for a hearing on February 8, 2006. On February 6, 2006, Petitioner, through her counsel, filed a Motion to Quash Notice of Discharge seeking a determination that the notice of discharge the Respondent issued to the Petitioner was invalid and that the Petitioner’s discharge violated D.C. Official Code § 44-1003.02(a).

At the hearing on February 8, 2006, the Petitioner appeared and was represented by Mary Ann Parker, Esq., and Jerry Kasunic, D.C. Long-Term Care Ombudsman. The Respondent appeared through the administrator of the Facility, Elizabeth Muchnick, and was represented by William A. Davis, Esq.

At the commencement of the hearing, I considered the Motion to Quash filed on behalf of Petitioner. The motion sought a finding that the Notice was invalid on several grounds and a resulting determination that the Facility could not validly discharge the Petitioner. I construed the motion to be for summary adjudication pursuant to OAH Rule 2828.

OAH Rule 2828 provides that a motion for summary judgment must be filed in accordance with the provisions of OAH Rule 2812. Among these requirements are that the motion may not be filed within 14 days of the trial, absent a showing of good cause, and the opposing party has 11 days to file a response. OAH Rules 2812.4 and 2812.7, respectively. Since in accordance with D.C. Official Code §44-1003.03(b) the hearing in this case was scheduled within 5 days of Petitioner's request, good cause was shown for the hearing of the motion on less than 14 days' notice. After oral argument by counsel for both parties, I declined to render judgment on the Motion to Vacate pending the close of all evidence and proceeded with the scheduled evidentiary hearing. OAH Rule 2824.1.¹

Based upon the testimony of the witnesses and my evaluation of their credibility, and the admitted exhibits, I now make the following findings of fact and conclusions of law:

II. Findings of Fact

¹ As this decision is based upon the hearing record rather than Petitioner's Motion to Quash, Petitioner's Motion to Amend Motion to Quash Notice of Discharge filed post-hearing on February 9, 2006, is deemed moot.

Until her recent discharge, Ms. Arrowood resided at the Facility for the past thirteen years. In March 2005, based upon what was perceived to be an improvement in Ms Arrowood's medical condition, the Respondent concluded that she no longer required the level of skilled services it provided. During the following fall, the Respondent's social worker unsuccessfully sought Ms. Arrowood's placement with several community residential facilities.

In December 2005, the Respondent gave Ms. Arrowood a Notice for Discharge or Transfer from the Facility. The Respondent sent a copy of this notice to Ms. Arrowood's brother but did not send a copy to the D.C. Long-Term Care Ombudsman (the "Ombudsman"). After conversations with the Ombudsman's office, the Respondent determined that it had not properly mailed this document to all necessary parties and that it was thus "null and void". Ms. Muchnick concluded that the Respondent should not issue another notice for discharge to Ms. Arrowood until after Christmas. Shortly thereafter, Ms. Arrowood's brother, who had previously represented her under a power attorney, advised the Respondent that he would no longer be responsible for her.

On or about January 23, 2006, the Respondent gave the Petitioner a second Notice of Discharge or Transfer (the "Notice"). Petitioner's Exhibit ("PX") 104. The Notice stated that she would be discharged from the Facility on February 25, 2006, because she "does not require skilled care". The Notice also identified additional reasons by reference to page numbers of a pamphlet Ms. Muchnick intended to attach to the Notice. The destination indicated in the Notice was "Her Luther Place Church shelter across st. [sic] or such other facility if found".

On January 26, 2006, Ms. Arrowood signed the Notice and returned it to Ms. Muchnick. In the interim, the Facility determined that a bed was available at the shelter designated in the

Notice. The Facility's social worker then drafted a statement which indicated that Ms. Arrowood agreed to move to "Luther Place Night Shelter on 1-27-06" and that she agreed "to moving on a short notice". Respondent's Exhibit ("RX") 200. Ms. Arrowood signed this statement as well as a Designation of Representative form indicating that she wished to be represented by the Ombudsman. PX 104.

On January 26, 2006, the Ombudsman received a voice mail message that he believed to be from Ms. Arrowood advising of her discharge from the Facility. Based upon his previous conversations with representatives of the Facility, the Ombudsman believed that Ms. Arrowood was to be transferred to a community residential care facility rather than a shelter. On January 27, 2006, the Ombudsman contacted Ms. Muchnik by phone and advised her to send him a copy of the Notice. He did not consent to Ms. Arrowood's discharge from the Facility.

On January 27, 2006, the Facility discharged Ms. Arrowood and transferred her to the N Street Village Shelter, a woman's night shelter which, though originally founded by the Luther Place Memorial Church, is now an independent entity.

On February 1, 2006, the Ombudsman received the Notice. On February 3, 2006, Ms. Arrowood filed her Hearing Request.

III. Conclusions of Law

Petitioner asserts that the Notice should be quashed and her discharge found improper on the grounds that it is violative of federal and District of Columbia law in that, among other things, it fails to provide the required 30 days notice for a transfer or discharge, fails to provide the definitive place to which the Petitioner will be moved; fails to adequately specify the reasons for the proposed transfer or discharge beyond mere conclusory language and that the Petitioner was moved from the facility prior to the date provided in the Notice for discharge. *See generally* 42 CFR § 483, Part B; D.C. Official Code §§ 44-1003.01 and 44-1003.02(d)(1); 22 DCMR 3200.1).

To summarize Respondent's position, as a result of the Petitioner's improved medical condition she allegedly no longer requires the level of skilled care provided by the Facility. Since delay may have resulted in the loss of the space that was then available to her at the N Street Shelter, the Petitioner consented to move and /or to abbreviate the normal notice period. Respondent further asserts that any alleged defects in the Notice were merely technical and do not warrant the relief sought by Petitioner. Finally, Respondent contends that the Petitioner's hearing request was untimely and therefore this administrative court lacks jurisdiction of her appeal. (*See* Respondent's Post-Hearing Brief And Opposition to Motion to Quash Notice of Discharge).

The Nursing Home and Community Residence Facility Residents' Protection Act of 1985, as amended, (the "Act") requires a facility to give the resident and his or her representative advance written notice of a discharge or transfer, stating among other things the reasons for the action and the proposed effective date. D.C. Code § 44-1003.02. Here, the Notice was mailed to

the Ombudsman, Ms. Arrowood's representative, on January 27, 2006, the day of her discharge. He did not receive the written notice until February 1, 2006. As the Act clearly requires both *written and oral advance* notice to the representative, verbal notice of the discharge fails to meet this statutory requirement.

The Respondent contends that the Act's advance notice requirement was obviated by Ms. Arrowood's consent to the discharge. Yet, the Act requires advance notice in all but emergency situations. D.C. Official Code § 44-1003.02(b). Without such advance notice, a resident may be effectively denied the benefit of the stay otherwise automatically imposed upon a timely challenge to a proposed discharge or transfer. D.C. Code § 44-1003.03(a)(3) *See Paschell v. The Washington Home*, 871 A.2d 463 (D.C. App. 2005) (the requirement of advance notice of discharge "in all but emergency situations is integral to the statutory scheme" because the statute makes stay of the discharge mandatory).

The statutory scheme is also subverted by a failure to provide advance notice to the resident's representative. The "protection" afforded by the Act shields many of our most vulnerable citizens, the disabled and the elderly, from being improperly removed from a facility. This protection and the resident's right to a mandatory stay of such removal may be effectively denied if a resident is discharged without prior written notice to her representative and advisor. Thus, the Act requires that the notice be served upon both the resident and her representative before a discharge.

The applicable federal regulations require at least 30 days notice before a resident's transfer. 42 C.F.R. § 483.12(a)(4); 22 DCMR 3200.1 (applicability of specified provisions of 42 CFR Part 483 to nursing facilities in the District of Columbia). As provided under the Act,

certain emergencies permit a more immediate transfer. 42 C.F.R. § 483.12(a)(5). Additionally, if the resident's health improves sufficiently to allow a more immediate discharge and the resident's clinical record is so documented by her physician, the notice period may be reduced. 42 C.F.R. §§ 483.12(a)(5)(C) and 483.12(a)(3)(i). In all events, notice must be given as soon as practicable *before* transfer or discharge. 42 C.F.R. §§ 483.12(4), 483.12(5) and 483.12(5)(ii).

Unlike the federal regulations, D.C. Official Code § 44-1003.02(c) provides that, "[C]onsent by a resident *and his or her representative* to a discharge...or abbreviated notice" is valid if "knowingly and voluntarily given". (emphasis supplied). Whether this provision conflicts with the federal regulations' requirement of advance notice in all cases and is thus subject to federal preemption is an issue which need not be addressed in this case. *See Newman v. Kelly*, 848 F. Supp. 228, 238-40 (D.D.C. 1994) (discussing federal preemption of District regulations in Medicare/Medicaid nursing care issues). Here, Ms. Arrowwood's representative, the Ombudsman, did not consent to her discharge. Indeed, he did not receive a copy of the Notice until four days after her discharge. It was only then that he was able to evaluate the proposed action and discern that the destination the Facility intended for Ms. Arrowwood was a homeless shelter rather than a community residential facility.

Finally, I conclude that the Petitioner's hearing request was timely. Since the Act requires service of the Notice upon both the resident and her representative, proper service is not completed and the appeal period does not commence until both "receive" the Notice. D.C. Official Code § 44-1003.03; *Mosley v. DOH*, Case No.: C-01-80085, Off. Adj. Hear., LEXIS *86 (Final Order, March 20, 2002) (the seven day appeal period does not commence until proper notice is received). Here, the Ombudsman received the Notice on February 1, 2006, and the Petitioner filed her request for hearing on February 3, 2006. The fact that the Petitioner rather

than her representative signed the appeal does not alter the fact that it was filed within 7 calendar days of the representative's receipt of the Notice. *Quality Care Services, Inc. v. Brown*, Case No.: C-00-80004Off. Adj. Hear. LEXIS *6 (Final Order, March 16, 2000).[failure to provide sufficient notice to the Long Term Care Ombudsman under the prior codification of the Act (D.C. Code § 32-1432), was found to “frustrate the very purpose” of the Act by impairing the resident's ability to obtain counsel through the Ombudsman so that counsel could timely request a hearing].

While this administrative court recognizes the efforts of the Respondent to attempt to secure a suitable, alternative placement for Ms. Arrowood, these efforts were unsuccessful. Instead, on January 27, 2006, without notice to her representative, any hearing on the substantive issues or a meaningful opportunity to stay her discharge, she was effectively transferred from her home of thirteen years to a homeless shelter. Such a result goes beyond mere technical defect as asserted by Respondent. It is untenable both as a practical matter, and as a matter of law.²

Since the Respondent failed to provide advance written notice to Ms. Arrowood's representative, her discharge from the Facility was not proper and hence is invalid. Moreover, there is no evidence that Ms. Arrowood waived or relinquished her right to readmission to the Facility or that her readmission would endanger the health and safety of herself or other residents. *Paschell, supra*. Accordingly, the Respondent shall immediately readmit Ms. Arrowood to the Facility.

IV Order

² Since I have determined that the Notice was defective because it failed to provide advance written notice of the discharge to the Petitioner's representative, I need not address other procedural defects, if any, or whether the Facility has established a substantive ground for discharge as set forth in D.C. Official Code § 44-1003.01(a).

Based upon the foregoing findings of fact and conclusions of law, it is this _____
day of _____ 2006:

ORDERED, that the Notice issued by Respondent, Sunrise Senior Living, to Petitioner, Marjorie Arrowood, is hereby determined to be invalid for failing to comply with D.C. Official Code § 44-1003.02(a) and Respondent's discharge of Petitioner in reliance upon that Notice was improper; and it is further

ORDERED that Respondent shall immediately readmit Petitioner to the Facility and it is further

ORDERED, that nothing in this Order prohibits Respondent from issuing Petitioner a new notice of discharge that is in full compliance with all applicable laws. Should any such notice be issued, Petitioner may contest it in accordance with applicable law; and it is further

ORDERED, that the appeal rights of any person aggrieved by this Order are stated below.

February 10, 2006

/s/ _____
Louis J. Burnett
Administrative Law Judge